TESTIMONY OF THE HONORABLE FRANK C. CARLUCCI
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BEFORE THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE
SUBCOMMITTEE ON LEGISLATION
ON H.R. 3822
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Mr. Chairman, at the outset, allow me to thank you and the Committee for the opportunity to exchange views with you on the proposed Intelligence Oversight Act of 1987. Historically, Secretaries of Defense testify before only one Subcommittee on each side of the Capitol. My appearance here today should not be construed as a change in that policy. The subject matter of the legislation, the degree of Presidential interest, and my prior position as National Security Advisor during the period when important NSC reforms were made which bear directly on these hearings brings me here today on behalf of the Administration. In effect, I am testifying on a one-time basis as a former NSC Advisor, not as a sitting Secretary of Defense.

Since H.R. 3822 is very similar to the Senate bill, S. 1721, you may already be familiar with the many concerns which I raised before the Senate Select Committee on Intelligence on December 16. The changes subsequently made by the Senate committee in its mark-up of S. 1721 addressed some of my earlier concerns. H.R. 3822 reflects a number of the Senate's modifications. Therefore, I will not repeat all of the same points here today.

Instead, I would like to offer the Committee my thoughts on this entire process of reconsidering our intelligence statutes -- to reflect on the circumstances which prompted the intelligence committees to consider new legislation, and to ask whether this

bill would improve the situation. I hope that the members will give my message serious consideration before committing themselves to a position on this legislation or on any particular provision within it. The consultation which has taken place at the staff level over the past two months, and the Committee's evident desire to consider all the facts and arguments before endorsing any change in the law, give me confidence that the Administration's views are receiving a thoughtful hearing before this committee.

I do not mean to patronize the members. The reason I raise the question of adequate consultation is that I strongly believe that this legislative proposal is the unhappy result of a breakdown in consultation between the Executive and Legislative branches. It serves no purpose to cast blame. An attitude of mistrust on both sides complicated the kind of confidence in one another which our Presidents and our legislators need in order to carry out their respective Constitutional duties effectively and successfully.

The Congressional Iran-Contra report was right when it said:

> "In a system of shared powers, decisionmaking requires mutual respect between the branches of government.... Democratic government is not possible without trust between the branches of government and between the government and the people." (p. 20)

Today, I would like to offer the committee my thoughts on H.R. 3822 as it relates to the goal of fostering these all-important relationships of trust and respect between the branches and between the government and the people. Those relationships suffered a setback in the Iran-Contra affair, as actions were

concealed from Congress and, in one key instance, from the President himself. An unhealthy lack of shared purpose between the Congress and the Executive -- to be blunt, an adversarial relationship -- kept key actors on each side from sharing confidences and building a lasting consensus which would apply to all of the tools of statecraft which support national foreign policy objectives.

I can think of no step by the Congress which would do more harm to the process of rebuilding an atmosphere of trust and candor between the branches than unilaterally to lay claim to prerogatives which the President firmly believes are vested in the Executive by the Constitution. Who among us can say with absolute certainty that no future President will ever be faced with circumstances requiring that notification of a covert action to the Congress be delayed beyond 48 hours?

One recent example, which both intelligence committees have discussed, is the assistance which Canada rendered to the United States in 1980 in helping to smuggle six American hostages out of Iran. As the Subcommittee has heard from a colleague who served on the full Committee at the time, Canada had one request in offering its cooperation: that the President not tell the Congress. Was this unreasonable? You and I might say "yes," believing that the Congress could be trusted to protect this information. But from Canada's perspective, clearly it feared having its own Embassy in Teheran laid siege, as our own had been, if its assistance became known. President Carter authorized

a covert action to get those six Americans safely out of Iran. He did not tell the Congress until after the fact. Some members disagreed but others argued that President Carter had done the right thing.

This example helps us to separate politics from process, and to understand how the founding fathers did the same thing when they designed our Constitutional separation of powers. Virtually all Americans would regard the rescue of six citizens in that situation as a goal justifying covert action, and they would view the Government of Canada as a worthy partner in that endeavor. Canada's demands for extreme secrecy would also appear reasonable. Yet the cold fact remains that if H.R. 3822 had been the law of the land in 1980, President Carter would have had to say "thanks but no thanks" to Canada. What would have happened to those six Americans, who were separated from the fifty-two Americans held in the American Embassy in Teheran, no one can say.

So there is more to the 48-hour notification issue than abstract theory. President Reagan's policy, as laid down in NSDD 286, is to do precisely what H.R. 3822 would compel him to do -- to notify the intelligence committees of covert action findings no later than 48 hours after they are signed. If this policy cannot be followed for exigent reasons, the NSPG is required to review the situation every ten days. Other provisions of the NSDD have been praised by the sponsors of the Senate legislation. This is not surprising since we consulted with the Senators as we developed our guidelines. We believe the NSDD works well with the

current statutory framework governing intelligence activities.

However, I urge the members to consider the effect of provoking a Presidential veto on legislation governing the entire realm of intelligence activities. Will this really improve the situation, or will it simply add to the atmosphere of mistrust in an effort to be certain that never again will an admitted mistake be repeated? The failures of the Iran affair were human and managerial. No statute can prevent these mistakes. How much better it would be to have a procedural and statutory framework that heals the wounds, provides for reasonable safeguards and encourages an atmosphere of trust. If trust, candor and accountability are the remedy to the problems which brought about the Iran-Contra affair -- as I believe they are -- the Congress risks undermining all of those goals, and reintroducing instead an unhealthy adversarial basis to the oversight process for years to come, if it incorporates a fundamental Constitutional disagreement into the law.

I have dwelt on this one central issue because I hope to persuade the members that the position taken by President Reagan and his immediate predecessors is reasonable and correct. Appropriate action was taken as soon as the President became aware of the true nature of what had transpired in the Iran-Contra affair. A new National Security Advisor was brought in. Judge Webster was nominated as Director of Central Intelligence. President Reagan prohibited the National Security Council staff from participating in covert action, and he upgraded the position and authority of the NSC Legal Advisor.

The President directed that findings be set in writing prior to initiation of the covert action. He ordered a full review of ongoing covert actions, and revised or terminated any which were not seen to be necessary or effective. Under a "sunset" clause, Presidential authority for a covert action now expires after one year unless he revalidates it.

The Congress' Iran-Contra investigation led to the conclusion that "the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance." (p. 423) With specific reference to the existing "laws and procedures to control secret intelligence activities, including covert actions," the congressional report concluded that, "Experience has shown that these laws and procedures, if respected, are adequate to the task. In the Iran-Contra Affair, however, they often were disregarded." (p. 375)

I do not believe statutory change is necessary. If government is to function effectively as well as responsively, there must be a line where the statutory framework ends and the President's internal management responsibility begins. No two Presidents are alike in their management styles. No two Administrations have used identical procedures and mechanisms for recommending options to the President or implementing Presidential decisions. We must allow our Presidents to manage, and each President must be allowed to manage his Administration in the manner which suits him best.

I note that the Senate committee report on S. 1721 states that the definition of the term "special activity," as used in the bill, "is intended, as written, to reflect and incorporate existing law and mutually-agreed upon practice." (p. 38) If this Committee intends to change the accumulated body of mutual understandings on these very important definitional and jurisdictional matters, I believe it is important to spell out the rationale. As Judge Webster noted in his recent testimony before you, a deviation from the existing practice regarding what constitutes a special activity could result in Executive branch agencies having to obtain findings for categories of activities that do not require findings today. I support Judge Webster's position that the Congress should not change the existing practice within the Executive branch on which activities are governed by a Presidential finding.

As Secretary of Defense, I have a particular concern in this regard that tactical military activities continue to be understood as distinct from covert intelligence actions. This is not a question of what the Congress should be told, but rather a question of which activities should require a Presidential finding. For example, should a finding be required every time we attempt to deceive the Soviet Union on the movement of nuclear weapons or the capabilities of our own military forces? Clearly not, according to the current definition. In addition, should a finding be required whenever the CIA lends clandestine support to an overt military operation by providing communication assistance

or by convincing local officials to assist in the evacuation of Americans from a foreign country? Again, clearly not under current practice. I hope that the members will recognize the importance of preserving the body of mutually-agreed upon practice between the branches.

We will not put the mistrust which caused the Iran-Contra affair behind us until we trust each other again. I urge the Committee to consider the very real adverse consequences of attempting to impose a new and inflexible statutory framework on our Presidents and our intelligence community. Let us instead test each other's good faith and professionalism, and give responsible officials in both branches a chance to earn each other's respect by giving real meaning to the concept of consultation. Not only does such an approach have the advantage of bringing the best out of our public servants: it is the way the founding fathers intended the system to work.

Thank you, Mr. Chairman.